

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34855

STATE OF IDAHO,	)	2010 Unpublished Opinion No. 435
	)	
Plaintiff-Respondent,	)	Filed: April 21, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
CHARLES EDWARD SMITH,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment of conviction and sentence for felony driving under the influence of alcohol, with a persistent violator enhancement, affirmed.

Charles E. Smith, St. Anthony, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Judge

Charles Edward Smith appeals from his judgment of conviction for felony driving under the influence of alcohol with a persistent violator enhancement. We affirm.

I.

FACTS AND PROCEDURE

At approximately 2 a.m. on June 20, 2007, Officer Andrew Linn of the Boise Police Department observed Smith stumbling around his vehicle and then watched as he eventually entered his car and drove to a bar. He watched Smith enter the bar, exit a short time later, reenter his car, and drive on the wrong side of the road toward the direction he came from. Believing Smith's behavior indicated that he was intoxicated, Officer Linn called for assistance to effect a traffic stop.

Officer Don Larson responded to the call for assistance, arriving just as Smith was driving away from the bar. He observed Smith drive slowly down the middle of the road and

initiated a traffic stop. After he made contact with Smith, Smith admitted to the officer that his driver's license was suspended. Officer Larson testified that he smelled the "odor of alcohol" coming from Smith's vehicle and asked Smith how much he had to drink that night, which Smith refused to answer. The officer also noticed that Smith was speaking slowly and that his eyes were bloodshot.

Officer Darren Mitchell responded to assist with the traffic stop and also observed Smith stumbling, smelled the odor of alcohol emanating from Smith, and noticed that his speech was slurred and his eyes were glassy and bloodshot. When Officer Larson asked Smith to perform field sobriety tests, Smith refused, offering a number of excuses as to why he could not do so. Smith was eventually arrested for driving under the influence and was transported to jail at which time he was asked to provide a breath sample. Smith again refused.

Smith was charged with felony driving under the influence (DUI), with the enhancement to a felony based on a prior felony DUI conviction, and driving without privileges (DWP). The information also sought a persistent violator sentence enhancement based on the two prior DUI convictions and one prior felony grand theft conviction. He pleaded not guilty and, after a dismissal and refile of the DUI charge, the case proceeded to trial.

At trial, all three officers testified, without objection, that Smith appeared to be intoxicated at the time of the stop and to be too impaired to drive. The jury found Smith guilty of both charges, and after waiving his right to a jury trial on the felony and persistent violator enhancements, the court found him guilty of both. He was sentenced to twenty-five years' imprisonment, with six years determinate. He filed an Idaho Criminal Rule 35 motion for reduction of sentence on the basis that the sentence imposed was "disproportionate for the crime of DUI" and that the presentence investigator's assessment was "inaccurate." Smith then apparently filed an amended Rule 35 motion alleging that his sentence was illegal; however, the motion does not appear in the record. The district court issued a written order, reducing the fixed portion of Smith's sentence from six years to five years. Smith now appeals.

## **II.**

### **ANALYSIS**

Smith's appellate counsel filed a brief raising one issue--whether Smith's right to a jury trial was violated by the officers' testimony that he was intoxicated. Counsel was then granted

leave to withdraw and Smith filed a “supplemental” brief pro se raising several other issues. We address each in turn.

**A. Intoxication Testimony**

Smith contends that his right to a jury trial was violated when the officers testified that, based on their training and experience, Smith was under the influence of alcohol and too intoxicated to drive. Specifically, he contends that testimony invaded the province of the jury. A trial court has broad discretion in determining the admissibility of testimonial evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will not be disturbed on appeal absent a clear showing of abuse of that discretion. *Id.*

On appeal, Smith acknowledges that no objection was made to the officers’ testimony at the time of trial, but contends that admission of the evidence was fundamental error such that he can raise it for the first time on appeal. We need not decide whether admission of the testimony is fundamental error because, even assuming, without deciding, that it may be raised for the first time on appeal, Smith’s contention that the testimony was improper is without merit.

Recently in *State v. Corwin*, 147 Idaho 893, 216 P.3d 651 (Ct. App. 2009), this Court addressed the very argument that Smith advances here. There, at Corwin’s trial for felony driving under the influence, one officer testified he believed Corwin was under the influence of alcohol. A second officer similarly testified that, at the time of the stop, he believed Corwin was too impaired to operate a motor vehicle. On appeal, Corwin argued that the officers’ testimony had invaded the province of the jury in regard to an ultimate issue of the case. We rejected this contention, first noting that Idaho Rule of Evidence 704 provides that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” We then examined *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992), where our Supreme Court held that an officer’s testimony that, based on the defendant’s performance on several field sobriety tests, he believed the defendant was intoxicated was admissible--not as independent scientifically sound evidence of Gleason’s intoxication but for the same purpose as other field sobriety test evidence--as a physical act on the part of Gleason observed by the officer contributing to the cumulative portrait of Gleason intimating intoxication in the officer’s opinion. We then concluded that the district court had not abused its discretion in allowing the officers to testify that Corwin was under the influence of alcohol and too impaired to drive, stating:

In this case, the officers described their observations and interactions with Corwin. They testified as to his behavior and physical state and, from that, their belief that he was under the influence of alcohol and too impaired to drive. The officers' observations that Corwin was under the influence of alcohol and too impaired to drive went to an ultimate issue of fact, but did not invade the province of the jury as to its determination of whether Corwin was or was not guilty of having driven an automobile while under the influence of alcohol.

*Corwin*, 147 Idaho at 896-97, 216 P.3d at 654-55.

Here, like in *Corwin*, the officers testified as to their observations and interaction with Smith, including his behaviors and physical state, and from those observations then testified as to their belief that he was under the influence of alcohol and too impaired to drive. Under *Corwin*, such testimony is not improper. Thus, even if we assume that we may reach the merits of this issue on appeal, Smith does not prevail.

#### **B. Constitutionality of DUI Statute**

Smith contends that Idaho's DUI "Statute(s)" are unconstitutional in that they violate the Equal Protection Clause and are void for vagueness. It is well established that challenges to the constitutionality of a statute that are raised for the first time on appeal will not be considered. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126-27 (1992) (declining to address a defendant's challenge to the constitutionality of the lesser included offense statute where he had not raised the issue before the district court); *State v. Wengren*, 126 Idaho 662, 668-69, 889 P.2d 96, 102-03 (Ct. App. 1995) (declining to address the defendant's claim that a statute defining the possession of a certain amount of marijuana plants as trafficking was void for vagueness because the defendant had not raised the issue below). The exception to this rule is that constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case. *Id.*

While the state contends that Smith did not raise the issue of the DUI statutes' constitutionality below, Smith contends that he did so in his amended Rule 35 motion. That motion, however, is not included in the record, but rather is merely attached as an exhibit to Smith's supplemental appellant's brief. Simply attaching a document to a brief is not sufficient to include it in the record. *See Hyde v. Fisher*, 146 Idaho 782, 786, 203 P.3d 712, 716 (Ct. App. 2009). The reason for such a rule is especially apparent here--the amended Rule 35 motion to which Smith refers contains no date stamp evidencing that it was actually filed with the district

court, a fact which is significant when Smith is intending to utilize the document to prove that he raised the issue below.

As such, on the record before us, there is no indication that Smith raised the issue of the constitutionality of the DUI statutes below and therefore, we decline to address the issue on appeal.

**C. Evidence of Smith’s Refusal to Take Field Sobriety Tests or Breath Test**

Smith contends that his Fifth Amendment right against compelled self-incrimination was violated when evidence of his refusal to submit to field sobriety tests or to provide a breath sample was introduced at the preliminary hearing and at trial. He also contends introduction of this evidence improperly shifted the burden of proof.<sup>1</sup>

The state again asserts that because Smith failed to raise this issue below, he is barred from pursuing the issue on appeal because it is not fundamental error. Again, we need not decide whether admission of the evidence is fundamental error because, even assuming, without deciding, that it may be raised for the first time on appeal, Smith’s contention that admission of evidence of his refusals is without merit.

We have previously noted that the Fifth Amendment privilege against self-incrimination is not implicated by the administration of a breath test. *State v. Harmon*, 131 Idaho 80, 84-85, 952 P.2d 402, 406-07 (Ct. App. 1998) (citing *Schmerber v. California*, 384 U.S. 757, 761 (1966)). In *Harmon*, we noted that the Fifth Amendment’s privilege against self-incrimination protects the accused only from compulsion to give testimony against himself or to otherwise provide “evidence of a testimonial or communicative nature.” *Id.* In order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a “witness against himself.” *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990). In addition, the United States Supreme Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of “physical or moral compulsion” exerted on the person asserting the privilege. *See South Dakota v. Neville*, 459 U.S. 553, 562 (1983).

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<sup>1</sup> Smith’s argument that the burden of proof was shifted appears to be part and parcel of his contention that his Fifth Amendment protection against self-incrimination was violated by admission of the evidence, and therefore we treat it as such here.

Applying these principles, in *Schmerber*, 384 U.S. at 760-65, the Supreme Court held that a state-compelled blood test to determine alcohol concentration was physical evidence and was not testimony or a communicative act, and therefore was unprotected by the Fifth Amendment privilege. The Supreme Court has also held that the admission of evidence showing that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination “[s]ince no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal,” *Neville*, 459 U.S. at 562, a holding this Court recognized in *State v. Curtis*, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984) (superseded by statute on other grounds). *Accord Ferega v. State*, 650 S.E.2d 286, 288 (Ga. Ct. App. 2007) (holding that evidence of a defendant’s refusal to submit to field sobriety tests is not subject to Fifth Amendment protection and is admissible as circumstantial evidence of intoxication); *State v. Mattson*, 698 N.W.2d 538, 552 (S.D. 2005) (same).

Accordingly, even if we assume that we may reach the merits of Smith’s contention despite his failure to object to admission of the evidence below, we conclude that the district court did not err in admitting the officers’ testimony regarding Smith’s refusal to take field sobriety tests or a breath test.

#### **D. Cumulative Error**

Smith also contends that several errors occurred at trial which constituted cumulative error requiring a reversal of his conviction and that he be granted a new trial. Specifically, he contends the court erred in allowing the state to “combin[e] both the felony DUI with the misdemeanor DWP,” in admitting his testimony regarding his “Fourteenth Amendment right to use the Highways,” and in allowing the state’s “infer[ence] to the jury . . . that Smith was guilty of DUI, because he ignored a license suspension on June 20, 2007.”<sup>2</sup>

The cumulative error doctrine requires reversal of a conviction when there is an accumulation of irregularities, each of which by itself may be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant’s constitutional right to due

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<sup>2</sup> Smith contends for the first time in his reply brief that the officer did not have the requisite level of suspicion to stop him and request that he perform tests to determine his intoxication level and that the district court applied the incorrect standard to its determination in this regard. According to Idaho Appellate Rule 35, we will not address this issue because it was not raised in either Smith’s initial brief filed by his counsel, nor in his pro se “supplemental” brief.

process. *Dunlap v. State*, 141 Idaho 50, 65-66, 106 P.3d 376, 391-92 (2004). In order to find cumulative error, this Court must conclude there is merit to more than one of the alleged errors and then conclude that these errors, when aggregated, denied the defendant a fair trial. *Id.* at 66, 106 P.3d at 392. As such, we first examine whether there is merit to any of Smith's assertions of error to determine whether, cumulatively, they deprived him of a fair trial.

Smith first contends that because of the court's dismissal of the felony charge at Smith's first preliminary hearing, the state was barred from prosecuting the misdemeanor DWP in conjunction with the previously dismissed felony DUI based on I.C. § 19-3506, which prohibits the state from dismissing and refiling a misdemeanor. Specifically, he argues that because the original charging document combined both the misdemeanor and felony charges, when the court dismissed the felony charge, it automatically dismissed the misdemeanor charge as well--and thus the state could not refile the misdemeanor.

Smith's assignment of error in this regard is without merit. The record indicates that only the felony DUI charged was dismissed and Smith cites no authority for his contention that when one charge in a charging document is dismissed, any others charges are automatically dismissed as well. This is simply not the rule. This misdemeanor was not dismissed and refiled; therefore there was no error.

Smith also argues that the court erred in allowing the misdemeanor and felony charges to be tried together, because it was prejudicial to him. Specifically, he contends it allowed the jury to infer his guilt as to the DUI charge based on evidence pertaining to the DWP charge. The record indicates that Smith objected to "consolidation" of the charges in a written motion on August 27, 2007, contending that he would be "unduly prejudiced" by the consolidation, that his DWP case had "no evidentiary value other than to show the jury that because of his suspended status he is thus probably also guilty of DUI," and that any probative value that would arise from the joinder would be "lost" by the prejudice that would arise when witnesses testified as to the suspended status of Smith's driver's license at the time of the incident. The record indicates that Smith's counsel argued against consolidation at a hearing, but the court granted the state's motion.

Whether joinder was proper is a question of law over which we exercise free review. *State v. Anderson*, 138 Idaho 359, 361, 63 P.3d 485, 487 (Ct. App. 2003). Idaho Criminal Rule 13 allows a trial court to "order two (2) or more complaints, indictments or informations to

be tried together if the offenses . . . could have been joined in a single complaint, indictment or information.” Idaho Criminal Rule 8(a) provides that joinder of offenses in a single complaint, indictment or information is proper “if the offenses charged . . . are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.” Thus, offenses may be joined if there is a factual connection or if they constitute part of a common scheme or plan, and importantly, the propriety of joinder is determined by what is alleged, not what the proof eventually shows. *State v. Field*, 144 Idaho 559, 565, 165 P.3d 273, 279 (2007); *State v. Cochran*, 97 Idaho 71, 73, 539 P.2d 999, 1001 (1975); *State v. Cook*, 144 Idaho 784, 790, 171 P.3d 1282, 1288 (Ct. App. 2007).

Actions properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that a joint trial would be prejudicial. *Field*, 144 Idaho at 565 n.1, 165 P.3d at 279 n.1; *State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); *Cochran*, 97 Idaho at 73-74, 539 P.3d at 1001-02. The defendant has the burden of showing such prejudice. *Caudill*, 109 Idaho at 226, 706 P.2d at 460; *Cochran*, 97 Idaho at 74, 539 P.2d at 1002.

We need not address whether the court erred in joining the charges, however, because even if it was error for the DWP charge to be tried with the DUI, the error would be harmless in regard to the DUI conviction given the extensive and convincing evidence of Smith’s guilt such that we believe, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to Smith’s conviction for DUI. I.C.R. 52.<sup>3</sup> See *State v. Sheldon*, 145 Idaho 225, 230, 178 P.2d 28, 33 (2008). Here, Officer Linn testified that he observed Smith stumble around his car, enter and leave a bar, and drive on the wrong side of the road. Officer Larson also observed Smith driving slowly down the middle of the road and after he stopped him and requested to see his driver’s license, noticed that Smith seemed to be having a hard time locating it. When Officer Larson asked Smith whether he remembered what he was looking for, Smith said “Yeah, I’m looking for my cell phone.” Officer Larson reminded Smith that he was looking for his driver’s license and Smith responded that it was in his back pocket. Officer Larson also testified that he smelled the “odor of alcohol” coming from Smith’s vehicle and that he had asked Smith how much he had had to drink that night, which Smith refused to

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<sup>3</sup> Idaho Criminal Rule 52 states:

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

answer. Officer Larson testified that he also noticed that Smith's speech was slow and his eyes were bloodshot.

Officer Mitchell testified that he observed Smith stumbling when he exited his vehicle, and like Officer Larson, had smelled alcohol on Smith, noticed that Smith's eyes were glassy and bloodshot, and noticed that his speech was slurred. Officer Mitchell also testified that when he asked Smith to perform several field sobriety tests, Smith refused, giving a number of excuses as to why he could not do so. All three officers testified that from their observations, they believed that Smith was intoxicated and too impaired to be legally driving.

Smith testified in his defense, contending that he had only had two drinks on the night in question and was in significant pain from a back injury. He challenged the officers' testimony that he had been driving on the wrong side of the road, had stumbled after exiting his vehicle, and that his eyes were glassy, indicated his distrust of law enforcement in general, stated that he had refused to take a breath test because he believed they were inaccurate, and said that he believed his blood alcohol level had been under the legal limit at the time. He also admitted that he had not told the officers the same story as he told the jury pertaining to his being out looking for his cell phone (which he believed he had dropped when walking home from the bar earlier that evening) at the time he was stopped and did not tell the officers that he had consumed two drinks earlier in the evening.

Given the officers' testimony regarding their observations of Smith's behavior and his refusal to submit to tests that would have measured his intoxication level--as well as his failure to testify to any significant exculpatory evidence--we conclude that there was a wealth of evidence by which the jury could have convicted Smith and that the evidence that he had been driving without a valid license did not improperly influence the verdict. As such, Smith's contention that the district court erred in joining the charges fails.

Smith also contends that "testimony regarding [his] Fourteenth Amendment Right to use the Highways [sic], prejudiced [him] . . . allowing for the conviction on the underlying charge of driving under the influence." The testimony to which Smith refers was given by him in response to the prosecutor's question as to whether Smith believed that he could "drive a motor vehicle to try to find [his] cell phone" despite knowing that his license was suspended. Smith responded, "I know I can drive a motor vehicle. Because it's my constitutional right under the Fourteenth Amendment. It's already been proven."

We agree with the state that the doctrine of invited error bars any finding of error here. Under the doctrine of invited error, a party is estopped from complaining that a ruling or action of the trial court that the party invited, consented to or acquiesced in was error. *State v. Carlson*, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). The purpose of the doctrine is to prevent a party who caused or played an important role in prompting a trial court to take a particular action from later challenging that decision on appeal. *State v. Blake*, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). Here, Smith himself made the statement which he contends was unfairly prejudicial to himself; he cannot now claim that it was error for the statement to be admitted. His claim of error on the point fails.

Finally in regard to cumulative error, Smith contends that “[t]he State was allowed to infer to the jury, that Smith was guilty of DUI, because he ignored a license suspension of June 20, 2007.” The exchange to which he refers occurred as follows:

[The prosecutor]: You ignored the driver’s license suspension on the 20th of June, 2007?

....

[Smith]: Okay. In my opinion, the State didn’t have the right to suspend my driver’s license.

Q: Do you think that the State has the right to prohibit people from driving under the influence of alcohol?

A: The State does not have the right to prohibit anybody from the use of the freeways, byways.

Q: Even if they’ve been drinking alcohol and are under the influence?

A: They can regulate, but they cannot prohibit.

Q: Meaning people will violate the law and do what they want; is that what you mean?

A: No.

Q: What do you mean then?

A: I’m saying you have a right to use the highways and the byways of this state and of this country. And that’s all I was doing was exercising a constitutional right so that I can work, pay taxes, pay my rent, be responsible to the community. And if I had to bend a suspension until I could make it legal through the court, then I was going to do that, yes.

Q: And if you could get away with driving under the influence, you were going to do that as well?

A: No.

Smith devotes one sentence in his brief to this argument and cites to no authority for his proposition that this was an improper inference made by the prosecutor such that it constituted reversible error that was fundamental (which would be required since Smith did not object to the line of questioning below). As such, we will not address the merits of this contention. *State v.*

*Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (holding that a party waives an issue on appeal if either authority or argument is lacking).

Even assuming the court erred in joining the charges, we have not found merit in any of the other errors advanced by Smith in this context, and therefore we conclude the cumulative error doctrine does not entitle Smith to a reversal of his conviction and a new trial.

#### **E. Legality of Sentence**

Smith asserts that his sentence is illegal because application of both the felony DUI enhancement and the persistent violator enhancement to his DUI conviction violates the constitutional protection against double jeopardy.

A claim that a sentence is illegal may not be raised for the first time on appeal without the trial court having had an opportunity to consider the legality of the terms of the sentence. *State v. Howard*, 122 Idaho 9, 10, 830 P.2d 520, 521 (1992); *State v. Hernandez*, 122 Idaho 227, 229, 832 P.2d 1162, 1164 (Ct. App. 1992). Here, Smith filed a Rule 35 motion to reduce his sentence, but the sole basis for his motion was not that the sentence was illegal, but that it was essentially “unreasonable” given his circumstances.<sup>4</sup> The district court responded by reducing the fixed portion of Smith’s sentence as a matter of leniency. Thus, while Smith challenged his sentence below, the issue of the *illegality* of the sentence has yet to be raised before the district court, and therefore we will not consider the issue on appeal. We do note that an illegal sentence can be corrected at any time by the district court. I.C.R. 35.

#### **F. Ineffective Assistance of Counsel**

For the first time on appeal, Smith contends that he received ineffective assistance of counsel at his BAC hearing because he was not represented by counsel. He also contends that he received ineffective assistance of counsel on appeal where counsel was unwilling to raise the

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<sup>4</sup> In the amended Rule 35 motion for reduction of sentence attached to his supplemental brief on appeal, Smith raises the issue of the legality of his sentence. However, as we indicated above, the amended Rule 35 motion is not properly part of the record, and thus we may not consider it on appeal. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). In the absence of an adequate record on appeal to support the appellant’s claims, we will not presume error. *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991).

issues presented in Smith's pro se supplemental brief and "instead focused on a marginal at best argument that Idaho authority is against."

Initially, we note that the administrative suspension of Smith's license and any proceedings related to it are not part of this criminal case and consequently cannot be part of this appeal. In regard to Smith's claim that his appellate counsel was ineffective, the state contends that the issue is moot, because Smith himself was permitted to raise the issues to this Court which he faults counsel for not raising in the appellant's brief filed on his behalf. An issue is moot if it "presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome" of the case. *Comm. for Rational Predator Mgmt. v. Dep't of Agric.*, 129 Idaho 670, 672, 931 P.2d 1188, 1190 (1997); *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996). The controversy must be live at the time of the court's hearing. *Id.* at 282, 912 P.2d at 650. A party lacks a legally cognizable interest in the outcome if even a favorable judicial decision would not result in relief. *See Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

We agree with the state that Smith's contention in this regard is moot. Even assuming the Court were to find that appellate counsel was ineffective for failing to raise the issues which Smith raises in his supplemental brief, such a determination would have no practicable effect on the outcome of the appeal, because Smith has raised those issues himself.<sup>5</sup>

### III.

### CONCLUSION

Even if preserved, Smith's contention regarding the inadmissibility of the officers' testimony that he appeared intoxicated and too impaired to drive fails. We will not reach the merits of Smith's challenges to the constitutionality of Idaho's DUI statutes or to the legality of his sentence because he failed to preserve the claims by raising them below. Again assuming that we may reach the issue of the admissibility of evidence that Smith refused to participate in field sobriety tests or to take a breath test where Smith raises the issue for the first time on

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<sup>5</sup> At the conclusion of his supplemental brief, under a heading entitled "Did the District Court Abuse It's Discretion?" Smith points out several instances in which he believed the district court abused its discretion at trial and sentencing. To the extent that any of these issues are not addressed by our conclusions above, we decline to address them as Smith provides no authority for his contentions. *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

appeal, we conclude that the use of such evidence did not violate his Fifth Amendment right against self incrimination. We also reject Smith's argument that his conviction should be reversed on the basis of cumulative error--having found no merit in multiple alleged errors he raises in regard to this issue. We do not reach the merits of Smith's argument that he was improperly denied counsel at the BAC hearing, because it not a part of the criminal case. Finally, we conclude that Smith's contention that his appellate counsel was ineffective is moot because Smith raised the issues on appeal which he faulted appellate counsel for not initially raising. As such, we affirm Smith's judgment of conviction and sentence for felony DUI and for being a persistent violator.

Chief Judge LANSING and Judge GRATTON **CONCUR.**